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**IN THE
COURT OF APPEALS OF INDIANA**

PATRICIA CUMMINS,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 54A01-0603-CV-113
)	
THE KROGER COMPANY,)	
)	
Appellee-Defendant.)	

APPEAL FROM THE MONTGOMERY SUPERIOR COURT
The Honorable David A. Ault, Judge
Cause No. 54D01-0304-PL-00125

March 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Patricia Cummins, brought suit against her former employer, Appellee Kroger Limited Partnership d/b/a Pace Dairy Foods (“Kroger”), claiming that her employment was terminated in retaliation for her claiming benefits under Indiana’s Worker’s Compensation statutes. Kroger moved for and was granted summary judgment in its favor. Cummins appeals.

We affirm.

The record reveals that in October of 1997, Cummins was employed by Kroger. While working on October 15, 1997, Cummins cut her left wrist or arm while opening a box with a box cutter. Cummins went to the hospital, received stitches in her wrist, and returned to work. Approximately two hours after returning to work from the hospital, Cummins went to the human resources office and asked to return to the hospital because her arm was still bleeding. Cummins then returned to the hospital and had more stitches placed in her wrist. The physician at the hospital instructed Cummins not to use her left hand to work.

Ultimately, Cummins requested that Kroger assist her in finding a specialist, and Kroger arranged for Cummins to see Dr. Andrew Combs with the Sports Medicine Institute of Indiana. Dr. Combs diagnosed Cummins as having a “post left wrist laceration with resolving infection, left median nerve injury.” App. at 361. Dr. Combs planned surgery to explore and repair the median nerve laceration. On December 1, 1997, Dr. Combs performed surgery on Cummins’s left hand. Cummins received worker’s compensation benefits from December 1 through December 22, 1997. Dr. Combs indicated that it might take six to twelve months for Cummins to fully recover

from the nerve repair. He restricted Cummins to doing work with her right hand only and to lifting no more than three to five pounds. Dr. Combs did not recommend physical therapy and recommended “observation only.” App. at 361. Cummins returned to work for Kroger after the surgery to repair her nerve injury.

The parties disagree as to what happened when Cummins returned to work. Kroger claims that Cummins worked in a “light duty” capacity as a result of her restrictions, citing Cummins’s deposition wherein she admitted that she was placed on “light duty” and was not “doing all her job functions.” App. at 146. Cummins, on the other hand, admits that she had certain restrictions placed upon her, but, citing her later affidavit, claims that her job duties did not change and that she was able to perform her job. Cummins was on “light duty” for thirteen weeks, which was the maximum that company policy allowed. After the thirteen weeks, Kroger informed Cummins that she had to take medical leave, and Cummins began to collect worker’s compensation benefits.

While on leave, Cummins continued to see Dr. Combs. Dr. Combs recommended that Cummins receive physical therapy and attend a “work-hardening” program, and Cummins received physical therapy and attended the work-hardening program from April to July of 1998. Dr. Combs recommended that Cummins do this to prepare for a Functional Capacity Evaluation (“FCE”), after which Dr. Combs would monitor Cummins’s progress. On June 1, 1998, Dr. Combs wrote:

“[Cummins] is six months post-injury, and I feel that she has reached maximum medical improvement. I would recommend two more weeks of therapy with functional capacity evaluation, and assign permanent work

restrictions and PPI rating. She is required to lift 40-50 lbs. at her regular work. I do not anticipate that she would be able to lift this heavy amount of weight using the left hand only. The left hand could assist the right hand. I will await the results of the permanent partial impairment to determine the final restrictions.” App. at 353.

On June 17, 1998, the FCE was performed on Cummins by NovaCare, and the FCE report stated in relevant part:

“Functional Limitations:

1. Pt [i.e., patient] presents with a moderate decrease in functional activity tolerance for elevated work.
2. Pt presents with limited abilities to lift weight at any level including floor-to-waist, waist-to-shoulder height and overhead lifting.
3. Pt presents with a tendency toward increased pain perception which may limit her functional abilities.

Functional Strength:

1. Pt demonstrates good cardiovascular endurance.
2. Pt demonstrates Fair (+) to Good body mechanics with good flexibility and balance.

Physical Descriptions Compared To Job Description: With the pt’s current lifting abilities, she would have difficulty completing her job as a Packer at Pace Dairy under the classification requiring her to lift between 10# and 40# from waist-to-floor level.^[1]

Recommendations:

1. Ms. Cummins may benefit from a transitional work program in which she is working approximately four hours a day in a restricted or light duty position at Pace Dairy if available and continuing with Work Conditioning/Work Hardening for half a day focusing on increasing her maximum lift to 40# from waist-to-floor level [sic] Ms. Cummins may also benefit from Interventions to help her deal with working through perceived pain and discomfort and focusing on her functional abilities versus her inabilities.
2. If the above job transition alternatives are not available, Ms. Cummins indicated that she was looking into retraining in a different job capacity. However, at this point in time, Ms. Cummins may have difficulty performing any job requirements that involve

¹ The evaluation stated that Cummins was unable to lift “20.25#” [sic] from floor to waist but was able to lower the weight to the floor. App. at 211.

extensive use of the left upper extremity secondary to focus on perceived pain and discomfort of the left hand and wrist.” App. at 212.

Cummins received her physical therapy from Dr. A. Joseph Santiesteban, Ph.D. On June 15, 1998, Dr. Santiesteban wrote a letter to Dr. Combs in which he stated that he believed that Cummins “can derive benefit from continued physical therapy in a return to work situation” and that he expected Cummins’s “strength will improve by another 20-30% in the near future.” App. at 385. Dr. Santiesteban also stated in an affidavit that he had observed employees in the plant where Cummins worked, and that Cummins was capable of performing the “essential and necessary functions” of her job despite the problems in her left arm. App. at 433.

On June 17, 1998, Dr. Combs again stated that he believed that Cummins had reached maximum medical improvement, and based upon her FCE, assigned a ten pound occasional lifting restriction from floor-to-waist,² and an eight pound restriction from waist level to overhead.³ Dr. Combs stated that Cummins could do frequent lifting of ten pounds from the floor to waist and four pounds from the waist to overhead. He put no restrictions upon her right arm. He gave her a permanent partial impairment (“PPI”)

² In an interim report dated June 17, 1998, Dr. Combs noted that Cummins had a twenty pound lifting restriction from the floor to waist.

³ The parties also disagree as to how much weight Cummins was able and/or allowed to lift and how much weight she was required to lift as part of her job duties. However, the job description for Cummins’s position required the employee be able to lift 40 to 100 pounds. Cummins claims that her job did not require her to actually lift this much weight, but the fact remains that the job description lists 40 to 100 pounds as its lifting requirement.

rating of 20% of the left upper extremity below the elbow.⁴ On August 13, 1998, Kroger sent Cummins a letter advising her that “your restrictions do not match the essential requirements of your job Effective August 14, 1998, your employment with Pace Dairy Foods of Indiana will end.” App. at 269. At a meeting between Cummins and her supervisor on August 14, 1998, her supervisor explained that Kroger had no positions available at that time which were compatible with Cummins’s work restrictions.

On August 23, 1999, Cummins filed suit in the United States District Court for the Southern District of Indiana, claiming that her discharge violated the Americans with Disabilities Act (“ADA”), and also alleging a claim of retaliatory discharge for seeking worker’s compensation benefits. On October 30, 2000, the District Court granted Kroger’s motion for summary judgment with regard to the ADA claim and declined to exercise supplemental jurisdiction over the state-law-based retaliatory discharge claim, dismissing the claim without prejudice. Over two and one-half years after the District Court’s order, on April 1, 2003, Cummins filed her complaint in the Montgomery Superior Court.⁵ On August 27, 2003, Kroger filed a motion to dismiss, claiming that Cummins’s action was untimely filed. On October 3, 2003, the trial court denied Kroger’s motion to dismiss. On September 2, 2005, Kroger filed a motion for summary judgment, again claiming that Cummins’s action was untimely filed and that it was otherwise entitled to judgment as a matter of law. Cummins responded to the motion for

⁴ In his June 17 letter, Dr. Combs erroneously referred to Cummins’s PPI as being 20% of the left upper extremity above the elbow. In a letter dated June 22, 1998, however, Dr. Combs clarified that he had meant the PPI rating of 20% to apply to the left upper extremity below the elbow.

⁵ Cummins filed an amended complaint on September 22, 2003.

summary judgment on December 9, 2005. The trial court held a hearing on the summary judgment motion on December 21, 2005. On January 25, 2006, the trial court issued an order stating:

“ Before the Court is Defendant’s motion for summary judgment. The Court, after reviewing the parties’ filing and being duly advised, hereby GRANTS said motion.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Plaintiff’s Complaint is dismissed, with prejudice.” App. at 486.

Cummins filed a notice of appeal on February 16, 2006.

As we explained in Meisenhelder v. Zipp Express, Inc., 788 N.E.2d 924, 926-27

(Ind. Ct. App. 2003):

“Summary judgment is appropriate only where no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Genuine issues of material fact exist where facts concerning an issue which would dispose of the litigation are in dispute. The moving party has the initial burden of demonstrating, prima facie, the absence of genuine issues of material fact. If the moving party does so, the burden then falls upon the non-moving party to identify a factual dispute which would preclude summary judgment. Upon appeal of a grant of summary judgment, we apply the same standard as the trial court, resolving any factual disputes or conflicting inferences in favor of the non-moving party. We consider only those portions of the record specifically designated to the trial court. Upon appeal, the non-moving party bears the burden of persuasion and must specifically point to the disputed material facts and the designated evidence pertaining thereto. We will liberally construe the designated evidence in favor of the non-movant, so that he is not improperly denied his day in court. Nevertheless, we will not become an advocate for a party, and the trial court’s entry of summary judgment will be affirmed if it may be sustained upon any theory or basis found in the evidentiary material designated to the trial court.” (citations omitted).

Here, Cummins claims that there remains a genuine issue of material fact as to whether the reason her employment was terminated was in retaliation for her requesting and receiving worker’s compensation benefits.

As a general rule, Indiana follows the doctrine of employment at will, under which employment may be terminated by either party with or without reason. Dale v. J.G. Bowers, Inc., 709 N.E.2d 366, 368 (Ind. Ct. App. 1999); see also Meyers v. Meyers, 861 N.E.2d 704 (Ind. 2007) (noting that the employment at will doctrine permits either the employer or employee to terminate the employment at any time for a good reason, bad reason, or no reason at all). In Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973), our Supreme Court recognized a narrow exception to this rule. The Frampton court held that an employee at will who was discharged for filing a worker's compensation claim could bring a claim for retaliatory discharge against her employer. 260 Ind. at 253, 297 N.E.2d at 428. As explained by the court, "Retaliatory discharge for filing a workmen's compensation claim is a wrongful, unconscionable act and should be actionable in a court of law." 260 Ind. at 252, 297 N.E.2d at 428.

It has been stated that "[t]he question of retaliatory motive for a discharge is a question for the trier of fact." Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1261-62 (Ind. Ct. App. 2002) (citing Dale, 709 N.E.2d at 369). However, the Powdertech court also noted that where causation or retaliation is at issue, summary judgment is appropriate only when the evidence is such that no reasonable trier of fact could conclude that a discharge was caused by a prohibited retaliation. Id. at 1262 (quoting Markley Enter., Inc. v. Grover, 716 N.E.2d 559, 565 (Ind. Ct. App. 1999)). Indeed, to survive a motion for summary judgment in a "Frampton" case, the employee-plaintiff must show more than a filing of a worker's compensation claim and the discharge itself. Id. Accordingly, the employee must present evidence which directly or indirectly implies the

necessary inference of causation between the filing of a worker's compensation claim and the termination. Id. Such evidence can consist of proximity in time or evidence that the employer's asserted lawful reason for discharge is simply a pretext. Id. The employee can prove pretext by showing that: (1) the employer's stated reason has no basis in fact; (2) although based in fact, the stated reason was not the actual reason for discharge; or (3) the stated reason was insufficient to warrant the discharge. Id.

In the present case, Cummins first argues against one of the grounds upon which Kroger based its motion for summary judgment, i.e. that Cummins's claim cannot succeed because there was no proximity in time between Cummins's filing for worker's compensation benefits and her termination. Kroger notes that Cummins admitted that she was not fired because she filed a worker's compensation claim and that this admission "utterly destroys" her claim of retaliatory discharge. Cummins counters by arguing that the temporal proximity need not have been between her filing and her termination. Cummins claims that she was not fired because of her initial filing for worker's compensation benefits, but instead that she was fired because she asserted her right to continued worker's compensation treatment and benefits. As Cummins explains in her brief, she was "discharged because when further medical care was needed, Kroger no longer wished to continue paying for her medical care as required under the Worker's Compensation Act." Appellant's Br. at 14. The main case relied upon by Cummins in support of this argument is Dale, supra.

In Dale, the plaintiff filed for worker's compensation benefits in July of 1995, but was not fired until November 23, 1995, a few days after having returned to work with

various restrictions and a few days after having been given a permanent impairment rating. Bowers, the employer, claimed that the work restrictions rendered Dale unable to fulfill the requirements of his job. Dale filed suit against Bowers, claiming retaliatory discharge, and the trial court granted summary judgment in favor of Bowers. Upon appeal, the court stated that simply because Bowers had articulated a reason which, at first blush, appeared to be independent of the worker's compensation claim, did not necessarily prove that there was no retaliatory motive for his discharge. Id. at 370. The court noted that the restrictions placed upon Dale's return to work were intended to be temporary only and that "Dale was discharged just two days after returning to work from a three-week doctor mandated absence, and just one day after receiving an impairment rating." Id. The court therefore concluded that there was evidence which could support an inference that Bowers's stated reason for discharging Dale was a pretext, and reversed the summary judgment. Id.

A similar situation occurred in Grover, supra. In that case, there was a six-month lapse between plaintiff Grover's claim for worker's compensation and when he was discharged, allegedly because he made derogatory comments about the employer in violation of company policy. Grover sued his employer for, among other things, retaliatory discharge, and the trial court denied the employer's motion for summary judgment with regard to the retaliatory discharge claim. Upon appeal, the court disagreed with the employer that the six-month time period which elapsed between Grover's filing for worker's compensation and his termination was fatal to his retaliatory discharge claim. The court reasoned, "Although a closer temporal connection between the two

events often supports an inference of retaliatory intent, a six month lapse has also sufficed when the other evidence before the court calls into doubt the employer's reasons for discharge." Grover, 716 N.E.2d at 565 (citing Pepkowski v. Life of Indiana Ins. Co., 535 N.E.2d 1164, 1168 (Ind. 1989)). Noting that Grover had been disciplined in the past for filing what the company considered a false claim for worker's compensation benefits and internal memoranda which indicated a hostile attitude toward Grover, the court held that a reasonable trier of fact could infer that the employer's stated reason for discharging Grover was a pretext and that the real reason was for his filing for worker's compensation benefits. Id. at 566.

In Pepkowski, supra, our Supreme Court reviewed a grant of summary judgment in favor of the employer on a retaliatory discharge claim. In so doing, the court noted that the plaintiff in that case had been hired in September of 1985 and was injured in October of that same year while on her lunch hour. In April of 1986, the plaintiff filed her application for worker's compensation benefits. The employer discharged the plaintiff in October of 1986, citing a "reduction in force and a lack of business" as the reasons. 535 N.E.2d at 1168. There was deposition testimony, however, which indicated that the employer's business was doing quite well at the time when the plaintiff had been fired. On appeal the court briefly addressed this argument, stating, "We conclude that [the employer] has failed its burden of proving an absence of a genuine issue of material fact with regard to the reasons for Pepkowski's discharge." Id.

The language used in Grover refers to retaliation for filing a worker's compensation claim, even though several months had passed since the filing. 716 N.E.2d

at 565-66. The Pepkowski court's treatment of the issue is so cursory that it is difficult to tell whether the court was focusing upon the employee's filing for worker's compensation benefits. Still, in citing Frampton, the Pepkowski court referred to retaliation for filing worker's compensation benefits. 535 N.E.2d at 1168. Neither of these cases is particularly helpful to Cummins's claim that she was fired because of her request to seek continued medical care and benefits under the worker's compensation system. Dale, however, presents a different picture. In that case, the court did not focus on the filing of worker's compensation benefits. Instead, the court simply stated that summary judgment was improper because the evidence permitted an inference that the employer's stated reason for firing Dale was a "pretext." 709 N.E.2d at 370. Cummins notes that in Dale, the plaintiff was not fired soon after he filed for worker's compensation benefits, but soon after he had returned to work with restrictions and received an impairment rating. Indeed, Dale was not fired until approximately five months after filing for worker's compensation benefits, yet such was not fatal to Dale's claim. Thus, Cummins claims that Dale supports the proposition that she may state a claim for retaliatory discharge when she alleges that she was fired not for filing a worker's compensation claim, but for continuing to seek and receive worker's compensation benefits.

If Dale were read as broadly as Cummins would suggest, several problems arise. First, Dale could be read to tacitly require an employer to retain an employee who could not perform his job duties, or else risk liability in a retaliatory discharge claim. We reject such a notion. Although the Dale court noted that restrictions upon the plaintiff in that

case were intended to be “temporary” only, the question arises: what if the “temporary” restrictions were to be in place for six months or a year? Would the employer be required to continue to employ an individual, who admittedly could not perform his job duties, until such time as he was fully healed, or else risk a claim of retaliatory discharge? To the extent that Dale could be read to require as much, we disapprove of such a broad reading.

This is especially so given the reluctance of our Supreme Court to broaden the exceptions to the employment at will doctrine. In Meyers, supra, our Supreme Court re-emphasized that the language in Frampton was “intended to recognize quite a limited exception.” 861 N.E.2d at 707. We therefore read Dale as we do Grover or Pepkowski. That is, the essence of a Frampton claim is a claim that the employee was discharged for filing or seeking worker’s compensation, not for seeking continued treatment.⁶ If there is to be any expansion of the Frampton doctrine, we will defer to our Supreme Court to do so.

That being said, even if Cummins’s claim were that she was fired for filing for or otherwise seeking worker’s compensation benefits, she would not prevail. The long delay between Cummins’s initial seeking of worker’s compensation benefits and her discharge is not, by itself, fatal to her claim, but as noted in Grover, and implied in

⁶ Indeed, if an employee’s only grievance is that they wish to continue to receive medical treatment and benefits under the worker’s compensation system, the employee should file a claim before the Worker’s Compensation Board, not seek recovery under a theory of retaliatory discharge. See Ind. Code § 22-3-3-4 (Burns Code Ed. Supp. 2006). At times, it appears that Cummins is seeking only the right to continued treatment or other benefits. However, the gist of her current claim is that she was wrongfully discharged because she wished to continue to receive treatment and other worker’s compensation benefits.

Pepkowski, a delay of several months between the filing for worker's compensation benefits and the discharge of the employee might still support a claim for retaliatory discharge "when the other evidence before the court calls into doubt the employer's reasons for the discharge." Grover, 716 N.E.2d at 565. Here, while the delay between Cummins's initial receipt of benefits and her discharge is not fatal, the other evidence falls short of surviving summary judgment.

To survive a motion for summary judgment Cummins must show more than a filing of a worker's compensation claim and the discharge itself and instead must present evidence which directly or indirectly implies the necessary inference of causation between the filing of a worker's compensation claim and the termination. Powdertech, 776 N.E.2d at 1261-62.

Here, Cummins admitted in deposition testimony that she could not do her job without violating the medical restrictions placed upon her.⁷ App. at 178. Therefore, we cannot say that Kroger's reason for discharging her had no basis in fact or was insufficient to warrant the discharge. Powdertech, 776 N.E.2d at 1262. Cummins could still prevail, however, by showing that, although based in fact, the stated reason for her discharge was not the actual reason for discharge. Given the state of the record before us,

⁷ We recognize that in a later affidavit, Cummins tried to distance herself from this admission by averring that she "was still able to fully perform the essential functions of my class two production job by using my right arm, with limited aid from my left arm." App. at 425. A party may not create an issue of fact by contradicting in a later affidavit the earlier deposition testimony. Meisenhelder, 788 N.E.2d at 930. Cummins admitted in the deposition that she could not have done her job "without violating the doctor's restrictions." App. at 178.

however, we conclude that no reasonable jury could conclude that the reason given by Kroger for firing Cummins was not the actual reason.

Kroger was given prompt medical treatment after her injury, and, after her injury, Kroger promoted Cummins to a full-time position. Even after her surgery, Cummins was not discharged, but was given thirteen weeks of “light duty” to assist her in her recovery. She was then put on medical leave and continued to receive treatment for her arm. It was not until approximately six months after her injury, when she was still not fully recovered to her pre-injury state, that Dr. Combs declared her to have achieved maximum medical improvement. Cummins does not complain that the treatment and/or benefits she received were inadequate; she only complains that she feels that she could have continued to improve until, someday, she might have been able to do her job. This is simply speculation. The letter from Dr. Santiesteban is similarly speculative in nature, suggesting that Cummins might have continued to improve if she had continued to receive physical therapy. Dr. Santiesteban’s affidavit wherein he claimed that he observed the working conditions and thought that Cummins could do her job does not overcome the fact that the restrictions placed upon Cummins at the time she was discharged left her unable to fulfill the posted lifting requirements of her position.

Given this evidence, we conclude that no reasonable trier of fact could conclude that Kroger’s stated reason for discharge was a pretext, i.e., that the reason for her discharge was her filing for worker’s compensation benefits. Instead, it is apparent that Cummins, with the medical restrictions placed upon her at the time of her discharge, did not meet the requirements of her position. Regardless, even if Cummins is correct, i.e.,

that she could have continued to improve, and that, at some point in the future, she could have improved to the point where she could do her job unassisted, Cummins points to nothing which would suggest that an employer must continue to employ a worker who, although she cannot currently perform her job duties, might someday improve to the point where she could do so. If Cummins has an issue with the way she has been treated by Kroger, it appears that her remedy would be to assert a worker's compensation claim that she had not reached maximum medical improvement and should receive continued treatment, not continued employment, from Kroger.

Given the state of the record before us, we cannot say that Cummins has demonstrated a genuine issue of material fact for trial. In other words, we conclude that no reasonable trier of fact could conclude that Cummins was let go for any reason other than her inability to perform her job without assistance. We therefore cannot say that the trial court erred in granting summary judgment in favor of Kroger.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.